

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 170 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
1 to 5 No.
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SINDHI ALIMOHMAD TAIYAB

Versus

THE STATE OF GUJARAT

Appearance:

MR B.D.KARIA WITH MR.RR TRIVEDI for Petitioner
MR.K.C.SHAH, ADDITIONAL PUBLIC PROSECUTOR for the
Respondent.

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.R.DAVE

Date of decision: 21-22-23/10/97

ORAL JUDGEMENT (Per: K.R.Vyas,J)

The appellant-accused has filed this appeal challenging the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Jamnagar in Sessions Case No. 22/86 whereby the appellant has been convicted for offence punishable under section

302 of the Indian Penal Code and sentenced to suffer R.I. for life and to pay a fine of Rs.500/- in default to undergo further R.I. for two months.

The prosecution case in nutshell, as stated in the complaint, Ex.61, by complainant Shivubha Nathubha (PW 2, Ex.27), an Armed Police Constable, is that one Aher Hardas Ebha was provided with police protection and the complainant was one of the members of the said police party. It is the case of the prosecution that on the day of the incident i.e. 17-7-85, the complainant and said Aher Hardas Ebha started for village Bhanvad at about 1.00 p.m. When they reached Dharagar bus-stop, they found Malde Jetha and Aher Karnabhai waiting for vehicle to come. At that time a rickshaw came there and as deceased Aher Hardas was about to board, the accused came there and attacked Hardas and inflicted ten to twelve knife blows. Hardas, with profused bleeding, fell down on the ground. The complainant fired two rounds from his rifle. However, the accused ran away. The complainant, with the help of Malde Jetha and Karna, removed the injured in a rickshaw to Bhanvad Government Hospital and lodged a complaint with Bhanvad Police Station which was recorded by P.S.I. Mr.Gohil. Mr.Gohil, on the basis of the FIR, registered the offence and carried out the investigation and on completion of the investigation submitted the chargesheet against the accused before the learned Judicial Magistrate, First Class, Bhanvad who on being found that the offence alleged against the accused is a sessions triable, committed the case to the Sessions Court.

Charge, Ex.2, for offence punishable under Section 302 was framed against the accused to which the accused pleaded not guilty and claimed to be tried.

The learned trial Judge, on appreciation of the evidence led by the prosecution and considering the statement of the accused recorded under section 313 of the Code of Criminal Procedure, convicted the accused for the offence with which he was charged, and hence, this appeal.

Mr.B.D.Karia, learned Advocate appearing for the appellant-accused, broadly submitted that the evidence of eye witnesses is not believable. In the submission of Mr. Karia, no conviction, on the basis of the evidence of such eye witnesses, can be based as the same is not corroborated by other witnesses. Mr.Karia further submitted that even though Shantilal, the rickshaw driver, was present at the time of the incident, he is

not examined and, therefore, an adverse inference is required to be drawn against the prosecution. Finally, Mr.Karia submitted that the evidence of the complainant Shivubha is not at all reliable in view of the improbable story put forward by him. In support of his submission, he has cited certain authorities which we will consider at an appropriate stage.

Mr.K.C.Shah, learned Additional Public Prosecutor, on the other hand, while supporting the findings of the learned trial Judge, submitted that no interference is called for and the appeal is required to be dismissed.

The prosecution, with a view to bring home the charge against the accused , has mainly placed reliance on the evidence of complainant Shivubha Nathubha (PW 2, Ex.27); Malde Jetha (PW 3 ,Ex.28), Karna Jadav (PW 4,Ex.29) and Karna Lakhu (PW 7, Ex.48). Complainant Shivubha Nathubha, at the relevant time, was an Armed Police Constable and was on duty being posted as Security Guard for deceased Hardas. According to him, on 17-7-85 at about 1.00 O'clock he and deceased Hardas Ebha started for Bhanvad . They reached Manpar bus-stop at about 2.30 p.m. and were waiting for the vehicle to come. At the bus-stop they saw Malde (PW 3), Karna Jadav (PW 4) and Karna Lakhu (PW 7). A rickshaw driven by Shantilal was stopped by Hardas and when Hardas was about to enter the rickshaw, the accused came there and started giving blows to Hardas with knife. On seeing this, the complainant loaded the rifle and opened firing and actually fired two rounds. The accused thereafter ran away towards Taragadh. The complainant identified the accused in the Court as the person who attacked the deceased Hardas. He had taken the injured Hardas to the hospital and informed the police by giving complaint. The police recorded his further statement on the same day. In the cross examination he has admitted that he was not knowing the accused either by name or by face prior to the date of the incident. He has also stated that he alone had gone to file the complaint. He has also stated that when Hardas was taken in rickshaw, the complainant was accompanied by Karna Lakhu and Malde Jetha. Since he used to purchase Bidi from the shop of Karna Lakhu and Malde used to sit at the shop Karna Lakhu, he was knowing both of them . Besides Malde and other witnesses being waiting at the bus-stop, there were other persons, including four to five ladies, also waiting for the vehicle to come. According to him , since the deceased and the accused were having scuffle, it was not possible for him to fire at the accused.

Malde Jetha (PW 3) has corroborated the say of the complainant. He has stated in his deposition that he was at Taragar bus-stop in the company of Karna Lakhu and Karna Jadav . At that time Hardas came with one police man i.e. the complainant Shivubha. He has also corroborated the complainant when he stated that the richskaw came there and when Hardas was about to board, the accused came there and inflicted about 12 to 13 knife blows. When the complainant opened fire, the accused ran away towards Taragar. This witness Malde accompanied the complainant to Bhanvad Government Hospital in the rickshaw driven by Shantilal. In his cross-examination, he has admitted that he was involved alongwith deceased Hardas and his sons Naran and Laxman in the murder case of the brother of the accused. However, later on they were acquitted. According to him when the incident in question took place, he, Malde and deceased Hardas were on bail. Apart from the murder case, this witness and deceased were also accused in another case for having committed an offence of attempting to commit murder filed by the accused and his brothers against them. He has admitted that the deceased Hardas was his uncle-in-law (Mama). About the incident he has stated that as the accused came running with knife and started inflicting blows to Hardas, he and Karna Lakhu hidden themselves behind the bush because of the fear and saw the incident from there.

Karna Jadav (PW 4) was also present according to the prosecution when the incident took place. Since this witness turned hostile to the prosecution, it is not necessary to refer to his evidence.

Karna Lakhu (PW 7) has almost given similar version as that of Malde (PW 3). It is no use narrating his evidence as it would be , in our opinion, mere repetition.

Mr.Karia, learned Advocate appearing for the accused has challenged the evidence of these witnesses by contending that the story put forward by them is so improbable that no reliance can be placed on their evidence. In the submission of Mr. Karia, Malde Jetha and Karna Lakhu are closely related to the deceased Hardas and were also involved in the offences punishable under Sections 302 and 307 of the Indian Penal Code when the brother of the accused was killed and in view of this animosity , their evidence is not at all reliable. Mr. Karia also criticised the conduct of these witnesses by contending that even though they were present and were

close relatives of the deceased, they did not do anything to save the life of the deceased and on the contrary got themselves hidden behind the bush.

There is no dispute to the fact that PWs 3 , 4 and 7 are related to the deceased and were also involved alongwith the deceased in a serious offence of murder of the brother of the accused. But merely because they are relatives and therefore interested , we cannot discard their evidence, especially when their presence is established by the evidence of the complainant Shivubha who has filed the complaint immediately without any delay before Bhanvad police station wherein he disclosed the name of these witnesses. It is also to be noted that PW 3 Malde and PW 7 Karna Lakhu accompanied the complainant Shivubha in the rickshaw when the deceased was taken to the hospital. It is not the suggestion of the defence that the complainant later on called these witnesses from village Manpar. In view of the fact that the FIR was filed without any delay disclosing the presence of these witnesses at the spot , we have to accept their presence. It is also clear from the evidence of the complainant that when the complaint was filed he was all alone meaning thereby the witnesses who accompanied were not present. The deceased was the relative of the eye witnesses. Therefore, it would be , their natural conduct to see that proper treatment is given to the deceased and, therefore, they stayed with the deceased leaving the complainant alone to go to the police station. The conduct of PW 3 Malde and PW 7 Karna Lakhu at the time of the incident of not running to the rescue of the deceased and hidening themselves behind the bush, even though appears to be some what unnatural, would not render their evidence unbelievable. It is difficult to offer any comments on their behaviour at the time of the incident. In any case, on the basis of their unnatural conduct, it is not possible for us to discard their evidence . Much has been said by Mr.Karia for non-examination of rickshaw driver Shantilal as acording to him he had witnessed the incident and was an independent witness and it is contended that for this reason an adverse inference is required to be drawn against the prosecution. True, Shantilal being a rickshaw driver and the injured was taken in his rickshaw to the hospital, the prosecution could have examined him but merely because he is not examined we do not think that there is no evidence against the accused., Assuming for the sake of argument that the evidence of Malde (PW 3) and Karna Lakhu (PW 7) being highly interested witnesses is not acceptable, even then, in our opinion, it would not damage the prosecution case in any way. In

any event, the conviction can be based on the sole evidence of the complainant Shivubha whose presence cannot be disputed. Deceased Hardas was offered police protection and Shivubha being an Armed Police constable with him on the day of the incident, his presence at the time of the incident cannot be disputed. There was no reason for him to falsely involve the accused. In his evidence he has clearly stated that he had not heard about the accused prior to the date of the incident. In his evidence he has clearly stated that he has given the name of the accused in his complaint as it was given by rickshaw driver when they were proceeding towards the hospital. It is not the suggestion of the defence that the name of the accused was given to him by Malde (PW 3) and Karna (PW 7) while they were proceeding towards the hospital.

Mr. Karia, learned Advocate for the appellant, submitted that in view of the contradictory statements given by the complainant regarding the source of knowing the name of the accused as stated by him in the complaint, his evidence is not believable. In this context, he has invited our attention to the evidence of the complainant wherein he has stated that he had come to know about the name of the accused from rickshaw driver Shantilal and, therefore, he had given the name of the accused in the complaint. According to his evidence, this rickshaw driver had given the name of the accused on the way. On being further asked, the complainant has stated that in his further statement he had stated so and therefore he has disclosed this fact in the complaint by giving the name of Shantilal. He has later on changed this version by stating that he had not stated in his further statement that the rickshaw driver Shantilal had given the name of the accused. Mr. Karia, learned Advocate for the appellant, has stated that in view of the contradictory versions given by the complainant, his evidence is not reliable and therefore not believable. It is not possible to accept this submission as, in our opinion, the complainant in his evidence has stated in his evidence that the rickshaw driver had given the name of the accused when they were proceeding towards the hospital and, therefore, he has stated the name of the accused in the complaint. He has also remained consistent in his say when he has stated that in his further statement that the rickshaw driver has given the name of the accused and, therefore, he has stated the name of the rickshaw driver in the complaint. It is true that we do not find this fact in the complaint, but merely because the source of information about the name of the accused is not disclosed in the complaint by the

accused, we do not think that the evidence of the complainant is worth rejecting. It is not necessary that each and every fact is required to be stated in the complaint. Reading the complaint, Ex.61, we are convinced, without any manner of doubt, that it contains all broad facts relating to the cognizable offence having taken place. The fact that the complaint was filed without any delay, there is no reason for us to disbelieve the evidence of the complainant. It is reasonable to infer that some discussion regarding the identity of the accused must have taken place in the rickshaw when the deceased was being taken to the hospital and, therefore, on the basis of the information gathered from the said discussion, if the complainant has mentioned the name of the accused in the complaint, we see no reason to discard the evidence of the complainant, especially when he has stated in no uncertain terms that the name of the accused was disclosed by the rickshaw driver on the way to hospital. Apart from this, the complainant being an independent witness having no axe to grind against the accused, there is no reason for him to falsely involve the accused. True, the story given by him about the scuffle between the deceased and the accused and the blows given by the accused on the person of the deceased does not appear to be convincing, particularly in view of the fact that even though he was having a rifle and was there as a guard of the deceased, he could not do anything to save the deceased and could fire only two rounds in the air when the accused run away for this behaviour of the complainant, we can only say that he has miserably failed to discharge his duties and to protect the life of the deceased. Though the manner in which he has described the incident regarding the scuffle being going on between the accused and the deceased does not appear to be natural, we cannot ignore the incident having taken place, nor it is possible for us to hold that the complainant was not at all present when the incident took place. In view of this, we hold that the learned trial Judge was perfectly justified in passing the order of conviction and sentence against the appellant and we are in total agreement with the reasons assigned by the learned trial Judge while reaching the conclusion as he did.

Mr.Karia has relied on various decisions on the question of appreciation of evidence, improbable story put forward by the prosecution and non-examination of material witness by the prosecution.

Pradesh 1968 SC 1402, the Supreme Court has laid down that it is the duty of the prosecution to examine material witnesses. It is open, however, to the prosecuttor not to examine witnesses who in his opinion have not witnessed the incident but normally he ought to examine all the eye witnesses in support of his case. It is further held that in a case where a large number of persons have witnessed the incident, it is open to him to make a selection. The selection must, however, be fair and honest and not with a view to suppress inconvenient witness. Therefore, if it is shown that persons who had witnessed the incident have been deliberately kept back, the court may draw an adverse inference and in a proper case record such failure as constituting a serious infirmity in the proof of the prosecution case. In Poonit vs State, 1984 (2) Crimes, 372 the Delhi High Court has held that the Court is justified in drawing adverse inference if some independent eye witnesses were not examined. In the present case also, the prosecution has not chosen to examine richshaw driver Shantilal but that by itself would not render the prosecution case unbelievable, as there is no unfair and dishonest intention on the part of the prosecution in not examining the said witness and that this witness has been deliberately kept back. In that view of the matter, in our opinion, no adverse inference can be drawn against the prosecution as constituting a serious infirmity in the proof of the prosecution case.

In Sawal Das vs State of Bihar AIR 1974 SC 778, the Supreme Court was concerned with the question of omission of important witnesses and the presumption arising because of the same. In that case the appellant, his father and his mother were charged for murder of appellant's wife. Immediately after the wife was pushed inside the room and her cries of "Bachao Bachao" came from inside the room, her children were heard crying and uttering words that their mother was either being killed or had been killed. There was also a maidservant present in the verandah outside the room and her statement was recorded under section 164 Cr.P.C. which was brought on record. But the children and the maidservant were not produced as witnesses in trial Court. In this context, the Supreme Court held that since the evidence of witnesses about what children said or did was admissible under section 6, the children may not have been examined under section 540 Cr.P.C. But the omission to produce the maidservant whose statement under Sec.164 could be used to corroborate or contradict her if she had appeared as a witness entitled the accused to ask the Court to give him benefit of presumption under section 114.

Relying on the aforesaid decisions, Mr.Karia submitted that the rickshaw driver Shantilal being a material witness, who not only disclosed the name of the accused to the complainant but had also identified the accused, has not been examined by the prosecution and, therefore, this Court should draw an adverse inference against the prosecution. As stated above, Shantilal was not the only material witness in the instant case but there were other eye witnesses. Even if the evidence of the relatives of the deceased is ignored, the conviction can be based on the sole testimony of the complainant. Therefore, non-examination of rickshaw driver Shantilal would not , in any case, materially affect the prosecution case.

Reliance is also placed on the decision of the Supreme Court in Palanisamy and Raju vs State of Tamil Nadu III-1986 (1) CRIMES 599. That was a case wherein the trial Court passed an order of conviction for mischief by fire to hut and causing murder of five persons sleeping in it. The High Court affirmed the said order. In the appeal before the Supreme Court, considering the facts of the said case, it was of the view that that the evidence of the eye witnesses about their presence at the scene was in doubt. In that context, the Supreme Court held that the retracted confession cannot be relied on when there is no independent corroboration to persuade the Court to act on them. As stated above, since we have believed the presence of the eye witnesses at the scene of offence, this decision cited by Mr. Karia would not take the case of the appellant any further.

In view of the aforesaid discussion, we are of the opinion that there is no merit in the present appeal and the learned Additional Sessions Judge was completely justified in passing the order of conviction and sentence against the appellant. Hence this appeal fails and is dismissed.

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